STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

Case No. 2000-1355-FC

vs.

ROBERT WILLIAM PANN,

Defendant.
_____/

OPINION AND ORDER
OF THE COURT

Defendant moved for a new trial pursuant to MCR 6.431.

Defendant was convicted of first degree murder of Bernice Gray (decedent) contrary to MCL 750.316(a) and weapons felony firearm, against MCL 750.227, following a jury trial, on January 29, 2001. Defendant was sentenced on March 8, 2001, to a term of life without parole and two years for the felony firearm. On March 6, 2001, defendant moved for a new trial pursuant to MCR 6.431, pending the receipt of the trial transcripts; a renewal of his motion was filed on October 13, 2005. Transcripts of the trial were promptly ordered, however, the record indicates that the court recorder asked for an extension of time for transcribing the trial, but the transcripts were not furnished to the parties until November 30, 2005, and not filed with the court until December 6, 2005, hence the excusable untimeliness of the instant motion.

Standard of Review

MCR 6.431(B) provides that on the defendant's motion, the court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice. A trial court may grant defendant's motion for a new trial only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon,* 456 Mich 625; 576 NW2d 129 (1998). Absent exceptional circumstances, issues of witness credibility are for the jury and the judge may not sit as a "thirteenth juror." *Id.* A decision on a motion for a new trial will not be reversed absent clear abuse of discretion. *People v Johnson,* 183 Mich App 305, 311; 454 NW2d 250 (1990).

Factual and Procedural Background

Defendant and decedent were romantically involved when decedent moved into defendant's home sometime in late 1987 or early 1988. The couple produced a child in February, 1990. In early December, 1991, decedent decided to move out of defendant's home for a variety of reasons, and moved herself and the child into her mother's home. On Christmas Eve, defendant proposed to decedent, and offered her an engagement ring he had purchased at a jewelry store in Lakeside Mall on December 19, 1991. Decedent turned him down. Both decedent and defendant were at a family gathering on Christmas Day at decedent's mother's house.

Decedent and her best friend, Monique Diederich, had made plans for the two of them to go to the Hyatt Regency on New Years' Eve to see "Cheap Trick." Later in the evening on December 25th, decedent informed Monique that defendant would be joining them.

On December 26th, at approximately 6:00 AM, decedent and her child left her mother's home to first drop the child off at day care in St. Clair Shores, then she planned to go to work in Southfield. The child was dropped off between 6:20 and 6:25 AM. Although there had been some witness accounts of sightings, Bernice Gray has never been positively identified alive or dead since then.

Decedent's car was found December 30, 1991 in Detroit near Eastlawn and Mack. DNA testing confirmed the blood found in the decedent's car belonged to decedent and the vehicle contained two spent shell casings and one spent bullet. The record indicates there was never any weapon found, no family member or friend or co-worker ever heard from decedent again, and despite the deployment of cadaver dogs, infrared lighting, digging operations, and other forensic techniques at the various sites owned by defendant, a body has never been found.

In January, 1995, Probate Court Judge Nowicki issued an Opinion and Order Establishing Death of Accident or Disaster Victim. See *In the Matter of Bernice Charlotte Gray,* Macomb Probate Court No. 94-139496-SE, brought by the prosecutor's office.

Once defendant was bound over for trial, he filed two motions to suppress defendant's 1996 domestic violence conviction; request that defendant's wife, Maureen Pann be granted transactional immunity to explain the "exaggerations" in her prior testimony if that testimony is admitted; suppression of defendant's alleged question, "Who snitched?"; suppression of other instances of hearsay that do not fall under any of the exceptions; exclude evidence of the Macomb County Probate Court Order Establishing Death; and request to quash the information. The Court denied all defendant's requests.

Defendant's second motion requested the exclusion of certain information found in an application for housing with the St. Clair Shores Housing Commission in which decedent indicated an urgency to increase her priority on the waiting list due to "family violence." Defendant also moved to suppress any mention of the statements of neighbors regarding an incident that occurred approximately 6 months prior to decedent's disappearance. The incident involved decedent showing up at the neighbors' door clad only in a front-door welcome mat and a pair of underwear, requesting she be allowed to use their phone to call her mother to come and get her. The Court denied defendant's requests.

Defendant's Substantive Arguments

As in his first motion, defendant reiterates the errors committed which he believes justifies a new trial:

(A) Insufficient evidence to convict under the standard provided in *People v Fisher,* 193 Mich App 284, 287; 483 NW2d 452 (1992), which holds that due process requires that the prosecutor introduce sufficient evidence that could justify a trier of fact in concluding that defendant is guilty beyond a reasonable doubt. Further, this Court has held that the victim's body is not necessary to establish the corpus delicti of homicide. *Id.*

(B) Error in allowing state to present "expert testimony" that when a body is removed from a crime scene, a family member is almost always involved.

(C) Error in permitting judgment of conviction from a different case to be entered and published to the jury as usurping jury function, being improper opinion testimony, hearsay and violated right to confrontation.

(D) Error in permitting improper hearsay evidence.

(E) Prosecutorial misconduct.

Analysis

Insufficient Evidence

With respect to subpart (A), in reviewing a claim of insufficient evidence, the Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find the defendant guilty beyond a

reasonable doubt. *People v Hardiman,* 466 Mich 417, 421; 646 NW2d 158 (2002). Circumstantial evidence and reasonable inferences that arise from the evidence can constitute sufficient proof of the elements of the crime. *People v Jolly,* 442 Mich 458, 466; 502 NW2d 177 (1993).

The following is a review of the substantive evidence permissibly admitted:

From the Prosecution:

- Testimony that the decedent moved in with defendant in 1988, and the couple produced a child in February, 1990.
- Testimony of decedent's father about a statement defendant had said in late 1989 or early 1990, after decedent's father bailed him out of jail for failing to pay child support and/or alimony unrelated to decedent: that defendant "knew of a guy that got rid of his old lady, got rid of the body and got away with the crime; no body, no crime, the perfect crime."
- Testimony that sometime in 1990, decedent filed an application for housing in the City of St. Clair Shores, but with no reference that it was because of domestic violence. Testimony of Jane Richards from the housing department that about 10 months later she received a telephone call from decedent inquiring as to the status of the application; it was at that time that the "domestic violence" selection was circled.
- Testimony that decedent's father saw two pistols at defendant's home prior to the disappearance of decedent in 1991.
- Testimony that in the summer of 1991 in the middle of the night, a next-door neighbor was awakened by decedent, appearing nervous and upset, requesting the use of the neighbor's phone to call her mother. The witness further testified that following the phone call, he noted that the decedent got into a car in the driveway of defendant/decedent's residence and left.
- Testimony that decedent moved out of defendant's home in early December, 1991, and moved in with her mother.
- Testimony that decedent and her mother went house-hunting for housing with bars on the doors and windows.
- Testimony from decedent's best friend that decedent had a new romantic interest in December, 1991. Further, witness testified that decedent telephoned her on Christmas Eve, 1991, sounding fearful and trembling, stating defendant had offered her an engagement ring and proposed marriage. When she declined, decedent stated defendant threatened to kill her.
- Testimony of Sandra Dzwonik that defendant unhappily told her on Christmas Day that decedent had turned down his marriage proposal and that she wanted to see other men. Testimony that defendant was among the several family members and friends who gathered for Christmas Day at decedent's mother's

house. Testimony that decedent was there, as well as her purportedly new "love interest", Don.

- Testimony from decedent's best friend that she and decedent had made arrangements for the two of them to go to the Hyatt Regency on New Year's Eve, but then learned on Christmas Day that defendant was going to accompany them.
- Testimony that decedent dropped the child off at the child-care provider's house in St. Clair Shores between 6:20 and 6:25 AM on the 26th of December before going to work.
- Testimony that a neighbor of the child-care provider, Mary Grillo, observed a man casing her house in the evening of December 24th, 1991, on 4 separate occasions the same night. She later identified defendant at a photo lineup.
- Testimony of a nearby resident of the child-care provider's house that at approximately 6:30 to 6:35 AM on December 26th, 1991, as he was scraping his car in his driveway, he heard a gunshot come from the proximity of the child-care provider's home.
- Testimony that decedent did not show up for work as scheduled or anticipated on December 26th, 1991.
- Testimony that defendant's employee was picked up at his house at 8-1/2 Mile and Van Dyke in Warren at about 9:30 AM on December 26th, 1991, by defendant. Further, witness testified that defendant had never previously picked him up for a job, rather they usually met at the yard where defendant stored his equipment. Witness stated they were to repair a crack in a basement wall that could have been done by one person. Witness further testified that after defendant picked him up that morning, they went to defendant's house at Eleven Mile and Jefferson, about six or seven miles away, where shortly thereafter, decedent's mother showed up, and asked defendant if he was going to help search for decedent. Defendant stated he would not because he had a job to do. Defendant and his employee then left for the job which was located at Masonic and Utica Road. Witness stated the job took about four hours to complete, and after it was finished, defendant dropped him off at his house about 3:30 PM.
- Testimony that defendant owned a back-hoe and a front-end loader. Witness stated it was his belief that the backhoe had been stolen sometime in November, 1991, although he had no personal knowledge of the alleged theft.
- Testimony of Michael Borowiak, the man for whom defendant and his employee fixed the crack in the wall in the basement. Witness remembers that he was there on the 26th of December for a short time when defendant began the work, but then left. Witness stated it was not an emergency job that had to be done by any certain date.
- Testimony of the manager of the jewelry store at Lakeside Mall where defendant had purchased the engagement ring on December 19, 1991. Witness stated that he opened the store on the 26th of December at 9:30 AM. Witness stated that normally they open at 10:00AM, but during the holidays it opens earlier. Defendant was waiting at the store when the manager opened the store at 9:30. Witness stated he tried to talk defendant out of returning it then as he had a full month from the date of purchase to return it and perhaps defendant could work

things out with his girlfriend. Witness stated defendant was quite sure he would not be needing the ring. A surveillance photo was introduced showing defendant in the store. It was dated December 26, 1991, 9:42 AM. Witness stated defendant would be issued a receipt stating that he was going to get a refund by a central check from the main office. After defendant left, the witness noticed dirt on the floor from defendant's construction boots, and revacuumed the floor.

- Testimony that decedent's mother made a missing person's report at the police station between 1PM and 1:30PM on December 26, 1991.
- Stipulation by the parties that decedent's blue Pontiac was found on December 30, 1991, on Eastlawn near Mack in Detroit. They further stipulated that blood was recovered from the car, that forensic scientists tested the blood and that the DNA showed it to be decedent's blood; that two shell casings and a spent bullet were found in the car, as well.
- Testimony of Dr. Werner Spitz, a forensic pathologist who examined decedent's car and concluded that the quantity of blood found indicated injury, an open wound, indicated a gunshot wound, that decedent was most likely shot in the head, then fell forward onto the steering wheel, then sideways onto the passenger seat where she rested until blood circulation stopped.
- Testimony from Dr. Spitz that the decedent was sitting in the driver's seat, that the shooter was outside the vehicle and shot from the passenger side, that the decedent was brain dead upon impact, and died within 5 to 10 minutes.
- Testimony from Dr. Spitz that decedent's body landed in such a position on the passenger's side that there would have been room for someone to further shove the body over to sit in the driver's seat and drive the auto away.
- Testimony that on the late day and into the evening of December 26th, repeated attempts to locate defendant were made by several family members. Finally at about 9:45 PM, defendant was contacted and he stated he had been "digging" and shopping.

From Defendant:

- Testimony from the occupant of the building in which defendant and his employee were asked to fix the crack in the wall indicated that on the 26th of December, the witness did not think they were there very long, and had arrived in either the late morning or early afternoon. The witness agreed that the job was not an urgent one, there was no deadline or that it had to be completed by the 28th of December.
- Testimony from retired Deputy Hutchins who conducted the lineup in March, 1993. It is noted that he was a neutral party, having been retired and no longer on the force. There were 6 people selected for the lineup including defendant. Mary Grillo identified defendant, although she said she thought he had his hair combed differently and it was a little thinner, although, overall she thought he was heavier than she had remembered when she saw him casing the care-giver's house. Ms. Grillo said at the time that she seemed to be very sure she was identifying the correct person.

- Testimony of Gerald Gray, the decedent's uncle. Witness testified that he distributed flyers about decedent's disappearance. On the stand, after reviewing a police report, he stated he had spoken to a man named Jeff Greggo at the Ten Mile and Mound gas station.
- Testimony of Brian Legghio, as an expert in the area of criminal defense. Witness testified that in his opinion, jail house "snitch" testimony is unreliable, using it for their own gain. In his opinion, the fact that defendant asked "who snitched" meant that "perhaps in the speaker's own mind there cannot be any evidence of his involvement. So it is like who said I did this."
- Testimony of Jeff Greggo, employed at the Ten Mile and Mound gas station on the day of decedent's disappearance. Witness stated that the picture of the decedent on the flyer looked familiar and he thought she had been in the station recently. Witness thought it may have been a couple of days earlier (meaning the 26th) that she had come in to purchase cigarettes, but he could not give an exact date or time, and he had not seen her before to his knowledge.
- Testimony of one of the officers called in to assist in the lineup for Mary Grillo. Witness stated Ms. Grillo identified defendant as looking similar to the individual she had in mind.
- Testimony of attorney attending the lineup only to observe and to make notations if there were any irregularities in the procedure. Witness agreed that the lineup was not unfair. Witness testified that at the bottom of the form a number "2" was written, indicating defendant as the suspect.
- Testimony of officer investigating decedent's car once it was located. Witness testified there were boxes both in the backseat and in the trunk of the car. Witness testified to blood spattering throughout the front seat area of the car.
- Testimony of Detective Jenny, as given during the 1994 grand jury hearings: witness opined, given his experience as a detective, at that time that another person assisted defendant and that defendant was not actually the trigger man, that following the shooting, defendant walked back to his own house and his assistant drove the car away with decedent inside to a location in the area of defendant's storage facility and temporarily dumped the body, then drove the car to the Eastlawn and Mack location. Witness stated defendant owned several parcels of land in the vicinity of defendant's storage facility. Witness further surmised that later that afternoon, defendant and his employee disposed of the body. The witness further stated in the 1994 grand jury hearings that he did not believe defendant would have come up with the idea of killing decedent. He concluded that at no time had they ever been able to come up with any good piece of physical evidence that would permit them to bring in defendant for questioning, but admitted that he has never been able to eliminate defendant as the killer, nor had he ever come up with another suspect.
- Testimony of Lieutenant McFadzen, who contacted the gas station attendant regarding the alleged sighting of decedent on the 26th of December. Witness stated he told the attendant that he had a police document that stated that he was contacted and he had said he had possibly seen decedent. The attendant allegedly stated it had been nine years and he could have been mistaken.

- Rebuttal testimony regarding the meaning of the word "snitch" by Sergeant Bechill. Witness stated defendant asked to be moved to a single cell because he could not get along with others, and had been taunted. When asked who taunted him, defendant responded that he wasn't a snitch and would not identify those individuals.

The substantial record evidence as presented has some glaring inconsistencies and contradictions which cannot be reconciled. The jury heard two entirely conflicting accounts of defendant's activities on the 26th of December: one account put him together with his employee from 9:30 AM until 3:30 PM, ostensibly the majority of the time used for making repairs to a building. Another account put defendant at Lakeside Mall at 9:30 AM to return the engagement ring, alone. All witnesses agreed the date was December 26th; the manager of the jewelry shop had physical proof that defendant was in his store at 9:42 AM on the 26th of December, 1991. A reasonable juror, in weighing the issues of credibility, would first logically deduce that defendant could not have been in two places at the same time, and would have to lean in the jewelry shop manager's favor, as he had the physical evidence, and he would have nothing to gain or lose by not being truthful. Contrast his testimony to that of the employee's who related that it was unusual for defendant to pick him up for a job, there was no reason given as to why they then went to defendant's home prior to going to the job site, and he also stated it really was a one-man job. Further, the employee made no mention of a trip to Lakeside Mall at any time, even though he was supposed to be with defendant at the time he was reportedly there. Although there is nothing to indicate that the employee actually had anything to do with the murder or disposal of decedent's body, a reasonable person could doubt the veracity of his accounting. This evidence, taken together with that of Detective Jenny who, in his opinion, believed there were two

people involved in the killing, serves to bolster a reasonable person's belief that defendant's employee was not truthful in his testimony in order to help create an alibi as to the parties' activities on the 26th of December, 1991.

Testimony and Evidence defendant moved to suppress:

- Statement made by defendant as reported by decedent's father: "The perfect crime, no body, no crime." Defendant objected to this statement made at the preliminary exam. It was allowed in as a statement by defendant introduced against him by party opponent; its relevancy; and related to his state of mind.
- Statement made during the return of the engagement ring that things weren't going to work out and he wouldn't be needing the ring.
- Conversation between defendant and decedent's mother indicating that defendant did not offer to help in the search of decedent.
- Conversations between decedent's mother and defendant relative to his relationship to the decedent and his decision to ask decedent to marry him.

The prosecution argued that MRE 801(d)(2) states that certain statements are not hearsay if they are made by a party opponent. However, case law dictates that a party admission must be excluded if the probative value is outweighed by unfair prejudice. All evidence offered against defendant is prejudicial – but is it necessarily unfair and therefore not to be admitted? The prosecution argued that all statements made by defendant to decedent's relatives after decedent's disappearance, and concerning either her disappearance or his relationship with decedent, are admissible, for they constitute exclusions or exemptions to the hearsay rule, MRE 801(d)(2)(A), and they are circumstantially probative of defendant's guilt, without being outweighed by unfair prejudice.

- Suppress defendant's statement inquiring "who snitched."
- Exclude evidence under MRE 404(b) or at a minimum to grant judicial use immunity to Maureen Pann.
- Exclude housing application completed by decedent on the basis that it is hearsay.
- Exclude evidence of decedent showing up at the neighbor's in the middle of the night to request the use of their phone to call her mother.

The Court ultimately ruled on these motions thus:

- Exclude evidence of the assault on Maureen Pann denied pursuant to MRE 404(b).
- Grant immunity to Maureen Pann denied.
- Suppress statement "who snitched" denied without prejudice to the scheduling of an evidentiary hearing.
- Suppress alleged hearsay statements denied pursuant to MRE 803(1), (2) and (3)[1].
- Denied defendant's statements to decedent's father about the perfect crime pursuant to *People v Miller (After Remand)*, 211 Mich App 30, 39; 535 NW2d 518 (1995); ("Prior statements are relevant where the circumstances of the threat and the murder are alike.")
- Denied exclusion of evidence of the Probate Court Order Establishing Death.[2]
- Denied motion to quash information.

With the exception of the admission of the assault on Maureen Pann in 1996, the Court finds the earlier court's rulings without error. MRE 404(b) provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

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[1] These statements include defendant's threats to kill decedent once she rejected his offer of marriage so he would not have to fight for custody of the child; decedent's mother's confrontation of defendant regarding his threats to kill decedent, of which he admitted, but only for purposes of kidnapping the baby. However, according to Courtroom Handbook on Michigan Evidence, "A threat may be relevant as non-assertive verbal conduct constituting circumstantial evidence of the state of mind of the declarant. *Id* at 466 n 18. Such a threat, like a promise, is not an 'assertion' and thus not a 'statement' for hearsay purposes, since it is not a positive declaration of fact, capable of being true or false. *Id.* See also explanation of MRE 801(d)(2), admission by party-opponent, *Id,* p 475, Further, while the declarant must be unavailable to use the statement against interest exception, *Shields v Reddo,* 432 Mich 761, 774 n 19; 443 NW2d 145, 150 n 19 (1989), a party-opponent admission can be used when the declarant is available and, in fact, an admission can be used without calling the declarant as a witness. See *Kuisel v Farrar,* 6 Mich App 560, 565; 149 NW2d 894, 896 (1967).

[2] The transcripts of the Probate Hearing demonstrate that decedent's death was established by testimony of the examining forensic pathologist, Dr. Werner Spitz.

MRE 404(b), "similar acts rule" is designed to avoid the danger of convicting a defendant based on historical misconduct rather than on evidence of conduct in a given case. *People v Golochowicz,* 413 Mich 298, 304; 319 NW2d 518 (1982). It should also be noted that MRE 404(b) expressly refers to "subsequent" as well as prior acts. *People v Puroll,* 195 Mich App 170, 171; 489 NW2d 159 (1992). Nonetheless, the Michigan Supreme Court has noted: "There can be little doubt that an individual with a substantial criminal history is more likely to have committed a crime than is an individual free of past criminal activity." *People v Allen,* 429 Mich 558, 566; 420 NW2d 499 (1988).

In the instant case, the crime of assault against Maureen Pann in 1996 was a subsequent crime, and not necessarily excluded under MRE 404(b) for that reason. However, even if evidence of other acts is not barred by the rule, it must still be otherwise admissible in evidence. There are 10 circumstances in which evidence of other wrongs or acts may be admissible:

1. To complete the story of the crime on trial by placing it in the context of nearby and nearly contemporaneous happenings;
2. To prove the existence of a larger plan, scheme or conspiracy of which the crime on trial is a part;
3. To prove other crimes by the accused so nearly identical in method as to identify them as the handiwork of the accused;
4. To show a passion or propensity for unusual and abnormal sexual relations;
5. To show, by similar acts, that the act in question was not performed inadvertently or involuntarily;
6. To establish motive;
7. To establish opportunity;
8. Without regard to motive, to show that the defendant acted with malice, deliberation or the requisite and specific intent;
9. To prove identity; and
10. To impeach an accused who takes the witness stand by introducing past convictions.

1 McCormick on Evidence (4th ed), §199, pp 799-808 (1992).

At trial, Maureen Pann, represented by counsel, invoked her Fifth Amendment right against self-incrimination. Defendant's counsel did not seek a hearing or otherwise object regarding this decision. Defense counsel objected to the Court's decision to a finding that Maureen Pann was unavailable under MCR 804(a)(1), however, a witness is unavailable under MRE 804(a) who cites the Fifth Amendment as a justification for not testifying. Defense counsel acquiesced to the reading of the redacted 1996 transcript into the record regarding defendant's assault against Maureen Pann. Further, defense counsel had no objection to publish the transcripts to the jurors. In his closing arguments, defense counsel stated:

> "The judge will instruct you that this testimony that you heard regarding Maureen Pann is being admitted in this case for a limited purpose, and it is be employed by you, if at all, in your deliberations for that limited purpose. The judge will specifically instruct you that you are not to infer that if Bob was involved in this Maureen Pann altercation, that he is a bad person and, therefore, he must have committed the homicide of Bernice Gray. He's going to instruct you in that regard that that is an improper purpose that you cannot employee [sic] in the context of your deliberations in deciding the guilt or innocence of Bob Pann in this case. It is being admitted for one purpose and one purpose only, to establish if the prosecution can by virtue of that evidence that the two crimes, the manner in which they were committed, are so similar as to compel the conclusion that the same guy is responsible for each crime."

Defense counsel then pointed out the differences between the two cases. The only instruction given the jurors regarding Maureen Pann by the court was, "the testimony of Maureen Pann was read into this trial because she was not available. This testimony was taken under oath at an earlier hearing. You should consider this testimony in the same way you consider any other testimony you have heard in court." The Court is not persuaded this an adequate cure for the introduction of the assault on Maureen Pann because it ignores the fact that defendant's assault on Ms. Pann should not have been introduced at all, pursuant to the circumstances as outlined above, as

well as not meeting the provisions of MRE 402 and MRE 403. However, given other factors already discussed and to be yet discussed, the Court finds the error to be harmless, however, because the curative instruction did not preclude the jury from accepting or rejecting the testimony. Moreover, the Court is not persuaded that any rational juror would have voted to acquit defendant on the sole basis of the erroneous curative instruction. Accordingly, the Court finds no error requiring reversal on this basis.

With regards to the Probate Court Order Establishing Death, the facts regarding decedent's death were clearly established by the live testimony, accessible to cross-examination, of Dr. Werner Spitz, who examined the decedent's car, therefore the Probate Court Order was neither particularly inflammatory nor persuasive, regardless of defendant's assertion that it was based on perjured testimony.

With respect to inadmissible hearsay, the critical determination is whether the error in admitting the testimony was harmless or reversible. *People v Stubl,* 149 Mich App 42, 46; 385 NW2d 719 (1986). Improper admission of evidence is ground for a new trial only if a miscarriage of justice has resulted. MCL 769.26. MCR 2.613(A) interprets this statute as requiring reversal only if the error is not harmless. See, also, footnote 1, *supra.*

The first inquiry is whether the error was so offensive to the maintenance of a sound judicial process that it never can be regarded as harmless. *People v Robinson,* 386 Mich 551, 563; 194 NW2d 709 (1972). This first test is not met if the error was deliberately injected into the proceedings by the prosecutor, if it deprived the defendant of a fundamental element of the adversary process, or if it was particularly inflammatory or persuasive. *People v Gallon,* 121 Mich App 183, 188-189; 328 NW2d 615 (1982).

The second inquiry concerning harmless error is whether the court can declare a belief that the error was harmless beyond a reasonable doubt. *Robinson, supra.* This test will be met if it is reasonably possible that, in the absence of the error, a juror would have voted to acquit. *Gallon, supra.*

Harmless, technical errors which do not bear upon the guilt or innocence of an accused are not grounds for reversal. Such is the policy of the State of Michigan as reflected by our statutes and court rules. *People v Shipp,* 175 Mich App 332, 341; 437 NW2d 385 (1989).

The appropriate standard of harmless error review depends on whether the error is constitutional or nonconstitutional in nature, and whether the appellant preserved the issue. *People v Carines,* 460 Mich 750, 774; 597 NW2d 130 (1999). If the error found by the Court of Appeals, erroneous admission of evidence, and the defendant objected to the admission of the evidence, then the error is nonconstitutional. Thus, the standard is that for preserved nonconstitutional errors. The standard is derived from MCL 769.26. In *People v Lukity,* 460 Mich 484; 596 NW2d 607 (1999), the Court said, MCL 769.26, with its rebuttable presumption, clearly places the burden on the defendant to demonstrate that a preserved, nonconstitutional error resulted in a miscarriage of justice. The bottom line is that MCL 769.26 presumes that a preserved, nonconstitutional error is not a ground for reversal unless "after an examination of the entire cause, it shall affirmatively appear" that it is more probable than not that the error was outcome determinative. *Id* at 493-496.

An error is deemed to have been "outcome determinative" if it undermined the reliability of the verdict. See *People v Snyder,* 462 Mich 38, 45; 609 NW2d 831 (2000).

In making this determination, the reviewing court should focus on the nature of the error in light of the weight and strength of the untainted evidence. *Lukity, supra* at 495.

Here, as part of the Court's instructions regarding hearsay, the Court stated:

> "The prosecution has introduced evidence of statements that it claims the defendant made. You cannot consider such an out-of-court statement as evidence against the defendant unless you do the following: first, you must find that the defendant actually made the statement as it was given to you. If you find that the defendant did not make the statement at all, you should not consider it. If you find that he made part of the statement, you may consider that part as evidence. Second, if you find that defendant did make the statement you must decide whether the whole statement, or part of it, is true. When you think about whether the statement is true, you should consider how and when the statement was made, as well as all the other evidence in the case."

The Court is persuaded that given the great weight of the circumstantial evidence as properly presented, the presence or absence of any hearsay testimony would not have changed any juror's vote, or that it was probable that the error was outcome determinative.

Prosecutorial Misconduct

Throughout the trial, the prosecution theorized that defendant had murdered decedent at approximately 6:30 AM in St. Clair Shores, then disposed of her body between 3:30 PM (after dropping off his employee) and 9:45 PM (when the decedent's family finally contacted him, and he agreed to go over to decedent's mother's house). The defendant's whereabouts between 3:30 PM and 9:45PM were paramount to the prosecution's theory of the case. When introduced in opening statements, defendant did not object. Further, the prosecution stated that the only indication of the defendant's whereabouts would come from the testimony of decedent's family regarding defendant's own statements (he had been "digging" and "shopping").

The test of prosecutorial misconduct is whether the defendant was denied a fair trial. *People v Watson,* 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided case by case and the Court must examine the pertinent portions of the record and evaluate the prosecutor's remarks in context. *Id.; People v Noble,* 238 Mich App 647, 660; 608 NW2d 123 (1999). The comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence. *People v Schutte,* 240 Mich App 713, 721; 613 NW2d 370 (2000). A prosecutor cannot make a statement of fact to the jury that is not supported by the evidence, but may argue the evidence and all reasonable inferences arising from the evidence. *Schutte, supra.* A prosecutor may not imply that a criminal defendant must prove something or present a reasonable explanation because such an argument tends to shift the burden of proof. *People v Guenther,* 188 Mich App 174, 180; 469 NW2d 59 (1991). The Court finds no shifting of the burden of proof. Our courts have permitted the prosecutor to offer a rhetorical argument regarding a defendant's failure to produce witnesses which could corroborate his story. *People v Gant,* 48 Mich App 5, 8; 209 NW2d 874 (1973). Here, defendant argues that when the prosecutor stated, "He has no witnesses that can account for his whereabouts between 3:30 and 9:45" the statement constituted a shifting of burden. Defense counsel objected, but the prosecution maintained that he was entitled "to comment on the lack of evidence concerning [defendant's] whereabouts."

Here, in taking the prosecutor's complete closing argument into context, it is clear the prosecutor merely argued that the evidence showed defendant's guilt. There is no evidence that the prosecutor attempted to persuade the jury with anything beyond the evidence presented.

The prosecutor is permitted, as an advocate, to make fair comments on the evidence, including arguing the credibility of witnesses to the jury when there is conflicting testimony and the question of defendant's guilt or innocence turns on which witness is believed. However, in every case, the remarks of the prosecutor must be viewed with reference to the prosecutor's duty of fairness. *People v Flanagan,* 129 Mich App 786, 795-796; 342 NW2d 609 (1983).

Lastly, remarks by a prosecutor, even if improper, do not constitute reversible error where made primarily in response to matters previously discussed by defense counsel. *People v Harris,* 31 Mich App 100, 102; 187 NW2d 502 (1971).

Ineffective Assistance of Counsel

To establish a claim of ineffective assistance of counsel at both the trial level and the appellate level, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that the deficient representation resulted in prejudice. *Strickland v Washington,* 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens,* 446 Mich 298, 312; 521 NW2d 797 (1994). Counsel is presumed to have afforded effective assistance. Defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney as guaranteed under the Sixth Amendment. *Strickland, supra.*

The defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *Strickland, supra.* A defendant can overcome that presumption by showing that counsel's failure to perform an essential duty resulted in prejudice. *People v Stubli,* 163 Mich App 376, 379; 413 NW2d 804 (1987).

Effective assistance of counsel includes the duty to prepare, investigate, and present all substantial defenses. *People v Kelly,* 186 Mich App 524, 526; 465 NW2d 569 (1990). As has been aptly stated by the United States Supreme Court, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland, supra* at 691.

In this case, defendant submits the following: several police reports were made of sightings of either decedent's car, or herself, which counsel failed to follow up on. These reports are included in the appendix section of defendant's brief. A review of them indicate that not following up on the reports was a reasonable decision given the rather weak and uncertain speculative information of the witnesses. For the sake of argument, however, even if those witnesses had testified, nothing they could have offered would have changed the stipulated facts in the case, nor is it likely that any of the testimony could have cut in defendant's favor.

Defendant also claims counsel should have interviewed auto repair shops in the neighborhood of the day care center which could have been the source of an auto backfire, and not a gunshot as reported by Gary Chupailo, and interviewed other residents in the vicinity who may have heard something unusual. Again, other evidence, i.e., Dr. Spitz's expert testimony would outweigh any speculative gunshot-like noises others may or may not have heard.

Defendant submits counsel was deficient when failing to take action to test the blood found in the car to see if it contained evidence of drug use, to counter the prosecution's argument that the decedent was not a drug user. The Court fails to find the relevancy of such evidence, and defendant has not offered any.

Defendant claims counsel failed to adequately prepare for witness Dr. Werner Spitz and failed to properly cross-examine him. Defendant submits he should have been prepared to inquire into the absence of any brain tissue or bone fragments in the car to show that the physical evidence in many ways was inconsistent with Dr. Spitz's opinion. The record shows defense counsel questioned Dr. Spitz at great length; moreover, the Court fails to find the relevancy of what defendant wanted to prove.

Defendant claims he failed to present a coherent counter-theory of what might have happened to decedent, failed to cross-examine Deputy Troester about his bias, and about the numerous theories other than his that might be correct. Defendant includes an opinion from Forensic Examination Service concerned with one topic only – that Deputy Troester's opinion that had it been a random act, the perpetrator would not have taken the body with him. The opinion by David Troester regarding this statement was " ... may be true in some cases, but not in others." Then he goes on to discuss other cases that have no bearing on the instant case.

Defendant claims counsel was deficient for failing to call Probate Judge Nowicki as a witness to show the deficiencies in the probate court proceedings that caused him to reach his determination. Defendant claims Judge Nowicki relied upon the testimony of Detective Jenny that the police had not received any reports or statements of any witness who had seen Bernice Gray after December 26, 1991. However, Dr. Werner Spitz testimony established the facts of decedent's death, and counsel had the opportunity at trial, and did in fact, extensively cross-examine him, and re-cross-examine his testimony.

Defendant was denied a fair trial by opinion testimony

Defendant objects to many instances during the trial when he claims the prosecution asked witnesses hypothetical questions. "[A] witness is prohibited from opining on the issue of ... the criminal responsibility of an accused, or his guilt or innocence." *Koenig v South Haven,* 221 Mich App 711, 725-726; 562 NW2d 509 (1997), *rev'd on other grounds* 460 Mich 667 (1999), quoting *People v Drossart,* 99 Mich App 66, 79-80; 297 NW2d 863 (1980). "The reason for this rule is that where a jury is as capable as anyone else of reaching a conclusion on certain facts, it is error to permit a witness to give his own opinion or interpretation of the facts because it invades the province of the jury." *Koenig, supra* at 726.

A careful review of the transcripts establishes that *both* defense counsel and the prosecution solicited opinion testimony. As an example (one of many), defense counsel on direct examination of Detective Jenny posed many questions requiring an opined answer, i.e. "Based on your investigation ... do you still believe that site in and around the location that Bob leased is the most likely site where Bernice's body has been disposed of?" Answer: "I believe so. "T.VIII, p 73. Again, defense counsel asked Detective Jenny if the crime was something that Bob accomplished on his own or whether he had assistance. Detective Jenny answered, "He accomplished it on his own. I have never been able to prove otherwise," to which defense counsel responded, "I want you to forget about what can be proven. Is it your opinion, and has it been your opinion, that Bob had assistance in pulling off or committing this crime involving Bernice Gray?" Detective Jenny responded, "I don't know."

MRE 701 permits lay witnesses to testify about opinions and inferences that are "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." *People*

v McLaughlin, 258 Mich App. 635, 657; 672 N.W.2d 860 (2003). The admissibility of a lay witness' opinion testimony is addressed to the discretion of the trial court, and the decision whether to allow the testimony is made under MRE 104(a). *Sells v Monroe County,* 158 Mich App 637, 647; 405 NW2d 387 (1987). The weight to be accorded a lay witness opinion testimony is for the trier of fact to decide. *Id.* at 647.

MRE 702 allows qualified experts to testify about "scientific, technical, or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue...." *Id.* Most expert testimony is in well-recognized fields of knowledge, and is routinely admitted, as here, in the field of forensic evidence. Since the key criterion to admissibility of an expert's testimony is that it must assist the trier of fact or be "helpful" some issues may be susceptible to either expert or lay proof. Weinstein and Berger, Evidence, §701[02], p 701-33. The helpfulness test incorporated in both Rules 701 and 702 means that the court should take a flexible approach tailored to the facts of the case. *Id.*

In this instance, in its discretion, the Court finds no error in the opinion testimony offered.

Conclusion

After considerable deliberation, the Court is not convinced that defendant has established any errors that undermined the reliability of the verdict. The overwhelming circumstantial evidence cuts in the prosecution's favor such that it militates against the granting of a new trial. Any errors made were either harmless or cured, and there is nothing to show that a miscarriage of justice has resulted.

To reiterate, a harmless error analysis entails the application of the rule the Court announced in *Lukity, supra,* "The object of this inquiry is to determine if it affirmatively

appears that the error asserted 'undermine[s] the reliability of the verdict.' Such error does not require reversal unless, in the context of the untainted evidence, "it is more probable than not that a different outcome would have resulted without the error." *Id.*

Accordingly, defendant's motion for a new trial is DENIED for the reasons stated herein. Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order resolves the last pending claim and closes the case.

IT IS SO ORDERED.

DONALD G. MILLER
Circuit Court Judge

Dated: May 12, 2006

cc: Joshua D. Abbott, Ass't Pros Atty
James Sterling Lawrence, Atty for Deft

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Carmella Sabaugh
COUNTY CLERK
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